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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 8

UNITED STATES OF AMERICA,

Appellant,

v.

EUGENE FRANK ROBEL,

Appellee.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON*

BRIEF FOR APPELLEE ON REARGUMENT

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STATEMENT

The order for reargument of June 5, 1967, directed counsel to brief "the questions presented" in addition to the question framed by the Court concerning the delegation of authority to the Secretary of Defense.

The brief for the government on the initial argument presented two questions:

1. Whether active membership, knowledge of unlawful organizational purposes, and an intent to effectuate them

are elements of the offense defined in section 5(a)(1)(D) of the Act.¹

2. If not, whether the section violates substantive due process and the First Amendment.

* Appellee's answering brief presented four additional questions (pp. 2, 38-62):

1. Whether the indictment is defective in failing to allege that the Communist Party is (and not merely that it has been ordered to register as) a Communist-action organization.

2. If not, whether section 5(a)(1)(D) is unconstitutional because it violates procedural due process, denies the requirements of indictment, jury trial and proof beyond a reasonable doubt, and is a bill of attainder.

3. Whether the section denies procedural due process because of its failure to afford affected persons an opportunity for a hearing on or judicial review of the designations of defense facilities by the Secretary of Defense.

4. Whether the registration order against the Communist Party has been invalidated by facts susceptible of judicial notice establishing the non-existence of a world Communist movement as described in section 2 of the Act.

The government did not file a reply, and thus failed to brief the additional questions presented by appellee. Nor has it briefed any of these questions in its brief on reargument despite the Court's order directing it to do so.²

All of the questions presented were fully discussed in appellee's initial brief. In what follows, therefore, we confine ourselves to noting the relevance to these questions of two

¹The government (Br. 48) and appellee (Br. 38) agree that they are not.

²The footnote in its brief on reargument (p. 2, n. 1) which garbles several of appellee's contentions into an unrecognizable jumble is obviously not compliance with the Court's order. And see *infra*, p. 13, n. 8.

decisions rendered since the argument,³ and to a discussion of the delegation question to which the Court has directed the attention of counsel.

ARGUMENT

I.

The Act's delegation of authority to the Secretary of Defense to designate "defense facilities" violates the constitutional prohibition against delegating legislative power.

Section 5(a) of the Act prohibits members of the Communist Party (once the order that it register as a Communist-action organization became final) from engaging in employment in any "facility" that the Secretary of Defense designates as a "defense facility."

Section 3(7) defines "facility" as any producing, manufacturing or service establishment, mine, transportation facility, public utility, laboratory, "or other establishment or facility, or any part, division, or department of any of the foregoing." The term therefore encompasses practically every enterprise that employs people.

Section 5(b) authorizes the Secretary of Defense to designate as a "defense facility" any such enterprise "with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions" of section 5(a). In other words, the Secretary can make it a crime for a Communist to work in any "facility" (i.e., almost anywhere) simply by finding that "the security of the United States so requires."

This authority lacks any objective standards or administrative procedures to control its exercise. It therefore gives

³*Communist Party v. United States*, ___ F.2d ___ (C.A.D.C. Mar. 3, 1967), and *Keyishian v. Board of Regents*, 385 U.S. 589.

the Secretary substantially unlimited discretion to curtail and virtually to eliminate opportunities for employment open to Communists. In this aspect, the Act delegates legislative power to the Secretary in violation of Article I, sec. 1 of the Constitution.

A. The Act does not define the phrase, "the security of the United States." Nor does it adumbrate considerations for the guidance of the Secretary in determining whether the exclusion of Communists from employment in a particular "facility" or class of "facilities" is required by "the security of the United States," however defined.

No standard to govern the Secretary's discretion can be spelled out of the recitals of section 2. Section 2(15) declares that, "The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States," and require "appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States." While this section speaks of "the security of the United States," there is nothing in its welter of rhetoric from which any limitation on the Secretary's power to make designations under section 5(b) can be implied.

Section 2(11), the only other recital even remotely relevant to the Secretary's authority under 5(b), finds that, "The agents of Communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law." The nature of these "tactics" is not described, and there is no finding that they involve the employment of Communists in "facilities." The recital, therefore, provides no clue to the criteria that Congress intended the Secretary to apply in administering section 5(b). Moreover, as we have shown (Brief for Appellee, 21-23, 31-33) the finding of section 2(11) is belied by the facts as well as by the find-

ings of the Subversive Activities Control Board with respect to the activities of the Communist Party and its members.

The government argues (Br. on Rearg. 7) that the specification in section 101(11) of Title II of the Internal Security Act (50 U.S.C. 811(11)) of certain defense installations and activities can be construed as a restriction on the authority of the Secretary of Defense to designate "defense facilities" under Title I. No such construction of the statute is possible. Title II, which provides for the "emergency detention of suspected security risks," delegates no authority to the Secretary and makes no reference to the designation of "defense facilities." The only inference that can be drawn from the omission from Title I of a specification of installations and activities such as appears in Title II is that Congress did not intend any such restrictive construction of the term "defense facilities."

The Act therefore contains no objective standard to govern the exercise of the Secretary's power under 5(b). His only guide is his judgment as to what "the security of the United States requires." But any judgment on that issue is necessarily subjective. It rests on views as to policy which are incapable of verification by reference to objective factors and are shaped primarily by the predilections of the man who makes the judgment.

Justice Jackson observed that, "Security is like liberty in that many are the crimes committed in its name." *Knauff v. Shaughnessy*, 338 U.S. 537, 551 (dissenting opinion). His observation reflects the nature of the "security" concept which, chameleon-like, changes coloration to match the complexion of the particular individuals who undertake to interpret and apply it. This is exemplified in the legislative history of the Act.

Congress found in section 2(15) that "the security of the United States" required the legislation. But President Truman stated in his veto message that, "in actual operation the bill would have results exactly the opposite of those intended," and "would actually weaken our existing internal

security measures." H.R. Doc. No. 708, 81st Cong., 2d Sess., p. 1. If Congress and the President could arrive at these contradictory determinations of what "the security of the United States requires," it is plain that the phrase provides no ascertainable standard for administrative action and can place no meaningful limitation on the Secretary's discretion under section 5(b).

It is beyond dispute that the section would be unconstitutional as a delegation of legislative power if it had omitted the reference to "the security of the United States" and, in terms, permitted the Secretary to designate "defense facilities" at will. In that form, the section would be indistinguishable from section 9(c) of the N.I.R.A., invalidated in *Panama Refining Co. v. Ryan*, 293 U.S. 388. The latter statute, which authorized the President to prohibit the interstate transportation of so-called "hot oil," was described by the Court as follows (at 414-415):

"The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined . . . So far as this section is concerned, it gives the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment."

Similarly, section 5(b) authorizes the Secretary "to pass a prohibitory law," the subject of which is defined (the employment of Communists in a "facility" that he designates), and disobedience of which is made a crime. As we have shown, the reference in the section to "the security of the United States" places no significant limitation on the authority of the Secretary "to determine the policy and to lay down the prohibition, or not to lay it down." Accordingly, the decision in *Panama* is controlling. Otherwise, what it characterized (at 430) as "the constitutional processes of legislation which are essential to our form of government" could be circumvented by a meaningless exercise in semantics.

B. The unlimited nature of the Secretary's authority to "lay down the prohibition [against the employment of Communists], or not to lay it down" is underscored by the omission from section 5(b) of any direction that the Secretary find the facts on which he bases his determination that the prohibition is required by "the security of the United States." This omission makes it all the more apparent that Congress was not prescribing an intelligible policy and confining the Secretary to its implementation when he finds that certain ascertainable facts exist. Instead, Congress authorized him to determine policy for himself, based on considerations of his own choice. Such a delegation is unconstitutional under *Panama*.

Section 5(b) therefore lacks what *Yakus v. United States*, 321 U.S. 414, 424, characterized as the "essentials of the legislative function." These are (*ibid.*), "the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." They are preserved (*id.* 424-425) "when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."

Section 5(b), as we have seen, does not lay down a "legislative policy," much less promulgate "a defined and binding rule of conduct." It does not condition the Secretary's authority upon the existence of "basic conditions of fact . . . ascertained from relevant data." Instead, it permits him to act upon a conclusory finding of an extravagantly vague political character that requires no factual support and is incapable of factual demonstration. Accordingly, the section is unconstitutional because "there is an absence of standards for the guidance of the [Secretary's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" (*Yakus*, at 426).

C. The vice of the Act in delegating broad and undefined power to the Secretary is aggravated by what we have shown to be its denial to the persons affected of an opportunity for a hearing on, or judicial review of, his action. Brief for Appellee, 55-58. We there showed that in this aspect the Act violates procedural due process. But the lack of administrative and judicial safeguards against arbitrary action by the Secretary is also relevant in determining whether the authority delegated to him oversteps constitutional limitations.

Thus when the Court invalidated section 3 of the N.I.R.A. because the authority given the President to promulgate codes of fair competition was over-broad, it emphasized that the statute "does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure." *Schechter Corp. v. United States*, 295 U.S. 495, 541. In contrast, it pointed out that the authority of the Interstate Commerce Commission "can be exercised only upon findings based upon evidence" and that the standards of "public convenience, interest or necessity" of the Radio Act of 1927 "were to be enforced upon hearing and evidence" (*id.* at 540). The Court distinguished the Federal Trade Commission Act on similar grounds, stressing that it provides "for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within statutory authority" (*id.* at 533). The N.I.R.A., on the other hand, "dispenses with this administrative procedure and with any administrative procedure of an analogous character" (*ibid.*). See also *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 144.

D. The Court has warned that, "Precision of regulation must be the touchstone in an area . . . touching our most precious freedoms." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438. Precision is likewise required of legislative delegations of authority to curtail these freedoms. As Justice Black has pointed out, "[The] cases show that when this Court con-

sidered that the legislative measures involved were of doubtful constitutionality substantively, it required explicit delegations of power." *Barenblatt v. United States*, 360 U.S. 109, 140 n. 7 (dissenting opinion).

This rule condemns section 5. For, as our initial brief showed, it is permeated with restraints on constitutionally protected freedoms. Under these circumstances, particularly, more is required of Congress than a vague and standardless delegation of authority to the Secretary to limit or eliminate, at his pleasure, the means by which Communists may seek a livelihood.

E. The government argues (Br. on Rearg. 9-12) that any insufficiency in the Act's original delegation of authority to the Secretary was cured by the enactment of the 1962 amendments to sections 3(7) and 5(b), eliminating the requirement for publication of a list of the "defense facilities" designated by the Secretary. The cure, it is said, was effected by the fact that the Secretary advised the Congressional committees considering the amendment that he had prepared a "tentative list" of his proposed designations and informed them of the four categories of activities which these designations included. The government cites *Zemel v. Rusk*, 381 U.S. 1, and *Hirabayashi v. United States*, 320 U.S. 81, as supporting the efficacy of this "cure."

We believe that the statute sustained in *Zemel* involves an invalid delegation of power for the reasons stated in the dissent of Justice Black. In any case, the decision is inapplicable. In the first place, the statute related to the conduct of foreign affairs where, as the Chief Justice emphasized (at 17), Congress "must of necessity paint with a broader brush than that it customarily wields in domestic areas."⁴ Second, the Court found (at 17-18) that the stat-

⁴ *Knauff v. Shaughnessy*, *supra*, relied on by the government (Br. on Rearg. 8-9), is similarly inapplicable since it involved a statute for the exclusion of alien, a function which the Court found (at 542) "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."

ute "took its content from history"—i.e., the "prior administrative practice" of the Department of State. Here, there was no prior administrative practice to give content to the statute, but only a "tentative" decision of the Secretary of Defense as to how he intended to administer it if the amendment was enacted.

The government's reliance on *Hirabayashi v. United States* is likewise misplaced. The Court sustained the statute there involved (at 92) only "as an emergency war measure" required at a time when an enemy invasion of the continental United States appeared imminent.⁵ It is clear, moreover, that the Secretary does not regard his authority to designate "defense facilities" as circumscribed by the four categories of activities which were described to the Congressional committees. For the indictment does not allege that the Todd shipyard (where appellee is employed) is, or was found by the Secretary to be, within any of these categories. Nor is there anything in the Secretary's notification to Todd of its designation or in the notice of designation to Todd's employees (Apps. B and C to Brief for the United States, pp. 58-61) to indicate that such was, or was found by the Secretary to be, the fact.

II.

The proposition that section 5(a)(1)(D) violates substantive due process and the First Amendment has been further substantiated by the decision in *Keyishian v. Board of Regents*.

Our initial brief (pp. 13-37) showed that this case is controlled by the rule in *Aptheker v. Secretary of State*, 378 U.S. 500, and *Elfbrandt v. Russell*, 384 U.S. 11, which condemns section 5(a)(1)(D) as a violation of substantive due process and the First Amendment.

⁵ *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163, also relied on by the government (Br. on Rearg. p. 8 n. 5) is likewise inapplicable as involving a war emergency measure.

Subsequent to the argument, the Court decided *Keyishian v. Board of Regents*, 285 U.S. 589, involving New York statutes whose effect was to make membership in the Communist Party with knowledge that the organization advocated the forcible overthrow of the government a disqualification for public employment. In invalidating these laws, the Court reaffirmed the principle of *Aptheker* and *Elfbrandt* which it capsulized in the statement (at 608) that, "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."

Section 5(a)(1)(D) sanctions membership in a Communist-action organization without regard to the intent of the member and hence is invalid under this principle. The section has an additional infirmity since it sanctions membership unaccompanied even by knowledge of an unlawful organizational purpose. See Brief for Appellee, 13, 16. It therefore presents an aggravated case of what *Keyishian* characterized (at 609) as "impermissible 'overbreadth'" in attempting "to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights."

III.

The demonstration in appellee's initial brief that section 5(a)(1)(D), as applied, violates procedural due process and the prohibition against bills of attainder has been confirmed by the decision in *Communist Party v. United States* that the order requiring the Communist Party to register under the Act cannot constitutionally be enforced.

On March 3, 1967, some months after the present case was argued, the Court of Appeals for the District of Columbia reversed the second conviction of the Communist Party for refusing to comply with the order requiring it to register under the Act. *Communist Party v. United*

States, ___ F.2d ___. The ground for the decision (at 2⁶) was that the registration requirement is "hopelessly at odds" with the Fifth Amendment privilege against self-incrimination.⁷ On April 3, 1967, the Department of Justice announced that it would not petition for certiorari, stating that, "This case is dead." *New York Times*, April 4, 1967.

These developments, which establish that the Communist Party cannot constitutionally be required to register under the Act, lend additional support to the demonstration in our initial brief (pp. 42-44, 52-54, 58-62) that, in two aspects, section 5(a)(1)(D), as applied, violates procedural due process and the prohibition against bills of attainder.

A. The invalidity of the section 2 findings concerning the world Communist movement.

The offense charged in the indictment (R. 1) is predicated on the existence of a final order requiring the Communist Party to register as a Communist-action organization. If the 1953 registration order against the Communist Party was invalid at the time of the alleged offense, appellee is not and cannot constitutionally be guilty. Brief for Appellee, 58. As we there showed, the validity of the order depended in turn upon the existence of a world Communist movement having the characteristics described in section 2 of the Act. We further showed (60-61) that, whatever may have been the case when the Act was passed, it is a matter of common knowledge that no such movement presently exists or existed at the time of the alleged offense.

Communist Party v. United States, *supra*, recognized as much (at 18, n. 11). After alluding to the section 2 finding of a monolithic world Communist movement controlled by an unnamed foreign power, the court observed:

⁶Page references are to the slip opinion.

⁷The decision of the panel, composed of Judges Prettyman, Danaher and McGowan, was unanimous.

"Although these words today may have an ironic ring in the ears of the foreign power in question, and in any event have not appeared to constitute the sole assumption upon which our foreign policy has been conceived and executed since they were placed on the statute books, we may assume that, as did the Supreme Court in *Communist Party*, they were true as of the time. Compare *Block v. Hirsh*, 256 U.S. 135 (1921) with *Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924), in which latter case Justice Holmes observed that, to the extent a Congressional declaration of fact looks to the future, 'it can be no more than a prophecy and is liable to be controlled by events.'"

The Act, as applied in the present case, insulates the validity of the section 2 findings from being "controlled by events." It does not permit appellee to litigate their current validity. Brief for Appellee, 61-62. Nor may the Communist Party do so unless it registers. *Id.* 44. But *Communist Party v. United States*, *supra*, establishes that the registration requirement is unconstitutional. Obviously, the vindication of appellee's constitutional rights cannot be made to depend on the willingness of others to surrender theirs.⁸

Hence, unless the Court is prepared to take judicial notice that events have invalidated the section 2 findings on which the entire Act rests, section 5(a)(1)(D), as applied, must be

⁸The footnote to the government's Brief on Reargument (p. 2 n. 1) containing its only comment on the questions presented by appellee misrepresents the relevant provisions of the Act. It states that, "the Act gives the Party, or a registered member, the right to periodically contest the Board's determination and to obtain judicial review of that determination (Sections 13 and 14)." This is not true. Section 13(b) and (i) permits the Party to contest the current validity of the Board's determination only if it first registers under section 7. And the Act does not permit a member—whether registered or not—to contest the Board's determination with respect to the Party. Section 13(b) and (i) merely allows him, if registered, to seek cancelation of *his* registration by showing that he is not a member.

found to violate procedural due process and the prohibition against bills of attainder because the existence of the facts on which its constitutionality is predicated may not be challenged. See Brief for Appellee, 62.

B. The failure of the indictment to allege that the Communist Party is a Communist-action organization.

The indictment alleges only that the Communist Party has been ordered to register as, but not that it *is*, a Communist-action organization. This omission rests on the government's interpretation that section 5(a)(1)(D) makes the registration order conclusive and precludes appellee from contesting the current validity of the Board's determination with respect to the Party. Brief for Appellee 38. We have shown that the government's interpretation must be rejected because, among other reasons, the section as so interpreted would violate procedural due process and the prohibition against bills of attainder. Brief for Appellee 42-44, 53-54. We there pointed out that this would be the case even if the Communist Party had registered and was therefore in a position to seek a re-determination of its status by proceeding under section 13(b). *A fortiori*, the government's interpretation would render section 5(a)(1)(D) unconstitutional now that *Communist Party v. United States, supra*, has established that the Communist Party may not constitutionally be required to register.

CONCLUSION

The judgment below dismissing the indictment should be affirmed.

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